11-4-2010

State v. Reid Respondent's Brief Dckt. 37107

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 37107
	)	
vs.	)	
	)	
COREY SKII REID,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

HONORABLE FRED M. GIBLER
District Judge

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

RULES

STATEMENT OF THE CASE

Nature of the Case

Corey Skii Reid appeals from his conviction for two counts of first-degree murder.

Statement of the Facts and Course of the Proceedings

Reid's girlfriend was Kristen Purtill. (Tr., p. 364, L. 3 – p. 365, L. 20.[1]) Cindy Bewick and Neal Howard accused Purtill of trying to turn them (Bewick and Howard) in on arrest warrants they believed were outstanding. (Tr., p. 386, L. 13 – p. 387, L. 18; p. 393, L. 1 – p. 394, L. 23.) When Reid was informed of the accusation he got angry. (Tr., p. 394, L. 24 – p. 395, L. 8.) After a further incident with a knife that also involved Bewick, Howard and Purtill, Reid became "irate" and told his friend Jon Kienholz that they would have to kill Bewick and Howard. (Tr., p. 408, L. 10 – p. 411, L. 17.) Reid then recruited his cousin Hiram Wilson to participate in the murder. (Tr., p. 411, L. 18 – p. 416, L. 3; p. 498, L. 15 – p. 509, L. 12.) The three men then drove to near where Bewick and Howard were camped, loaded a revolver Kienholz had acquired, and walked into the camp where Kienholz shot Bewick and Howard. (Tr., p. 419, L. 20 – p. 442, L. 5; p. 516, L. 24 – p. 537, L. 23.)

The state charged Reid with two counts of first-degree murder under an aiding and abetting theory. (R., vol. I, pp. 69-71, 78-79.) After a trial the jury

[1] References to the "Tr." are to the transcript as requested in the original notice of appeal containing three pre-trial hearings, the trial and the sentencing. Transcripts added by the July 27, 2010, motion to augment are not cited in the Appellant's brief and are not referenced in this brief.

found him guilty on both counts. (R., vol. II, pp. 280-81.) The district court imposed concurrent sentences of life with 30 years fixed. (R., vol. II, pp. 383-86.) Reid filed a timely notice of appeal. (R., vol. II, pp. 387-90.)

ISSUES

Reid states the issues on appeal as:

1. Did the failure to instruct the jury that it must find that Mr. Reid had the mental state of premeditation violate the constitutional guarantees of due process and a jury trial?

2. Were non-probative yet highly prejudicial photographs erroneously admitted?

3. Did the district court err in basing the sentence on unreliable evidence?

(Appellant's brief, p. 10 (citations omitted).)

The state rephrases the issues as:

1. The jury was instructed that to find Reid guilty on an aid and abet theory it had to find he had the same mental state as Kienholz, including premeditation. At trial Reid did not object that such an instruction does not include the requirement that the jury find that Reid premeditated the deaths of the victims. Has Reid failed to show error, much less fundamental error, in the jury instructions?

2. Because the bodies of the victims were not found for some time, they had been exposed to the elements and insects. The only available photographs therefore showed some damage to the bodies caused after death. Has Reid failed to show that the district court abused its discretion by admitting photographs showing post-mortem damage to the bodies?

3. Included in the extensive evidence presented at sentencing was a police report that included a statement by an inmate who related information he claimed came from Reid about the facts of the case. Has Reid failed to show that the district court committed fundamental error in not *sua sponte* excluding this evidence?

ARGUMENT

I.
Reid Has Failed To Show Error, Much Less Fundamental Error, In The Jury Instructions

A. Introduction

The jury instructions informed the jury that the state charged that Reid did "willfully, unlawfully, deliberately, with malice aforethought and premeditation, encourage, plan and assist Jon Allen Kienholz Jr. in the killing" of Howard and Bewick. (R., vol. II, pp. 307-08.) The district court gave the standard jury instruction that the jury must find a union of act and intent. (R., vol. II, p. 320.) The elements instruction included that to prove Reid guilty the state had to prove that Kienholz acted "with malice aforethought and premeditation" in killing Bewick and Howard. (R., vol. II, pp. 322-34.) The district court also instructed the jury: "To be an aider and abettor, one must share the criminal intent of the principal; there must be a community of purpose in the unlawful undertaking." (R., vol. II, p. 329.)

Reid did not object to these instructions. (Tr., p. 694, Ls. 3-12; see also R., vol. II, pp. 202-08 (defendant's proposed instructions).) During closing arguments defense counsel referred to the instructions and argued that to find Reid guilty the jury would have to find both acts that aided and abetted the murders and intent, and the acts would have to precede the murders. (Tr., p. 730, Ls. 13-21.) Counsel then built on this theme:

> But then it has to be coupled with the intent, with the specific intent that someone's going to die. And then, by doing those acts with Jon Kienholz, that Mr. Reid joined Jon Kienholz in a union, a

> meeting of the minds, that "We are going to kill two people." And when did that occur?

(Tr., p. 730, L. 22 – p. 731, L. 2.) Counsel argued that that the state's evidence of such a union of criminal intent and premeditation was not reliable, and that Kienholz alone had the intent to kill. (Tr., p. 731, Ls. 3-17.) Counsel then returned to discussing the jury instructions:

> And you must also find that Mr. Reid had the same idea and that he furthered that crime. Mr. Kienholz had to have his intent as specific as your jury instructions say. It had to be premeditated. And you have that definition. And it had to be with malice. Mr. Reid, in aiding and abetting this murder, to be guilty of first degree murder aiding and abetting, **would also have to have that same intent, premeditated and with malice**. And that those two, if you're going to find him guilty of that, that those two minds, those two intents, would have to be shared by these two people, that **they would have a community of purpose for their undertaking**.

(Tr., p. 731, L. 17 – p. 732, L. 4 (emphasis added).) Counsel then argued that the testimony of Kienholz and Hiram Wilson, two accomplices, was not believable or reliable. (Tr., p. 732, L. 5 – p. 736, L. 4.) Counsel later returned to the elements of the crime, and argued: "Now, [Kienholz's] premeditation and malice aforethought, in the commission of the murder, is not the same. You need to find that happened, and you need to find Mr. Reid had malice and premeditation in the idea that Kienholz was going to go forward and kill these people." (Tr., p. 738, Ls. 6-11.) Counsel concluded by arguing that the evidence indicated that Kienholz was the leader of the group and acted without being aided and abetted by Reid, and specifically asked the jury to "carefully read through and follow your jury instructions." (Tr., p. 740, L. 17 – p. 741, L. 6.)

In responding, the prosecutor did not deny defense counsel's interpretation of the instructions as requiring the state to prove premeditation by Reid. Rather, the prosecutor argued that the evidence established that Reid and Kienholz did share "a community of purpose." (Tr., p. 742, L. 25 – p. 743, L.23.)

On appeal Reid's appellate counsel (different from trial counsel) raises for the first time a claim that the jury instructions failed to instruct the jury that it must find premeditation by Reid. (Appellant's brief, pp. 10-19.) This claim fails because Reid has failed to show error in the instructions, much less fundamental error.

B. Standard Of Review

When reviewing jury instructions, this Court must determine whether "'the instructions, as a whole, fairly and adequately present the issues and state the law.'" State v. Hickman, 146 Idaho 178, 181, 191 P.3d 1098, 1101 (2008) (quoting State v. Sheahan, 139 Idaho 267, 281, 77 P.3d 956, 970 (2003)). Jury instructions must correctly inform the jury as to the elements of the crime charged. Id. An erroneous instruction is reversible error when the instructions, taken as a whole, misled the jury or prejudiced a party. Id.

C. Reid Has Failed To Show Error, Much Less Fundamental Error, In The Jury Instructions

"It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal." State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000). This same principle is embodied in I.C.R. 30(b), which reads, in relevant part: "No party

may assign as error the giving of or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the instruction to which the party objects and the grounds of the objection." Whether an issue was preserved presents a "threshold" inquiry. State v. Stevens, 115 Idaho 457, 459, 767 P.2d 832, 834 (Ct. App. 1989).

An unpreserved issue may only be considered on appeal if it "constitutes fundamental error." State v. Johnson, 149 Idaho 259, 265, 233 P.3d 190, 196 (Ct. App. 2010). In the absence of an objection "the appellate court's authority to remedy that error is strictly circumscribed to cases where the error is so fundamental that it results in the defendant being deprived of his or her Fourteenth Amendment due process right to a fair trial in a fair tribunal." State v. Perry, Docket No. 34846, 2010 Opinion No. 83 at pp. 17-18 (Idaho, July 23, 2010).

Review without objection will not lie under the fundamental error standard unless (1) the defendant demonstrates that "one or more of the defendant's unwaived constitutional rights were violated;" (2) the error is "clear and obvious" on the record, "without the need for any additional information" including information "as to whether the failure to object was a tactical decision;" and (3) the "defendant must demonstrate that the error affected the defendant's substantial rights," generally by showing that the error must have "affected the

outcome of the trial proceedings." Id. at 20.[2] Application of this three-prong test shows that Reid has failed to establish fundamental error.

The first element of a claim of fundamental error is that the error is constitutional. Perry, Slip Op. at 20. Here, however, there was no error, much less constitutional error.

Idaho law on the mental state element of aiding and abetting is well established: "To be an aider and abettor one must share the criminal intent of the principal; there must be a community of purpose in the unlawful undertaking." State v. Scroggins, 110 Idaho 380, 386, 716 P.2d 1152, 1158 (1985) (internal quotations and citation omitted). This was, with the exception of a comma, the exact language used to instruct the jury in this case. (R., vol. II, p. 329.) The instruction was an accurate statement of Idaho law regarding the required mental state for being an aider and abettor.

Reid does not acknowledge that the jury was instructed, word for word, with the mental state requirement for aiding and abetting as articulated by the

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[2] In Perry, the Court said its "restatement" of the fundamental error standard "shall not be given retroactive application." Perry at *8. Reid suggests the Perry opinion may not apply to him because his crime occurred before Perry was decided. (Appellant's brief, p.13.) The general rule is that decisions announcing new rules are to be applied "to all criminal cases still pending on direct review" and are applied retroactively (to collateral attacks on final judgments) only in limited circumstances. Rhoades v. State, 149 Idaho 130, 233 P.3d 61 (2010). See also Whorton v. Bockting, 549 U.S. 406, 416 (2007) ("new rule" applies to cases on direct review but generally not retroactively to collateral attacks on final judgments). Because this is a direct appeal, and not a collateral attack on a final judgment, application of Perry in this case is, by definition, not "retroactive." In addition, Perry has been applied to another case where the alleged error preceded the issuance of the Perry decision. See State v. Longest, Docket No. 36083, 2010 Opinion No. 106 (Idaho, October 6, 2010).

Idaho Supreme Court.[3] (See generally Appellant's brief.) Instead Reid argues that the instructions "of course" refer only to the intent to shoot the victims. (Appellant's brief, p. 12.) Nowhere, however, do the instructions refer to any intent to shoot the victims. On the contrary, the instructions provide that the jury may not convict unless it finds that Kienholz "willfully, unlawfully, deliberately, and with malice aforethought and premeditation kill[ed]" the victims (R., vol. II, pp. 322-23 (capitalization and punctuation altered and numbering omitted)) and that Reid "shar[ed] the criminal intent" of Kienholz such that he and Kienholz had a "community of purpose in the unlawful undertaking" (R., vol. II, p. 329.) Reid's claim that "the instructions do not, in any way, state that Mr. Reid must have acted with the mental state of premeditation" (Appellant's brief, p. 12) is simply not accurate. Reid has failed to show any error in the jury instructions, which were a verbatim statement of the law from precedent of the Idaho Supreme Court.

The second element of a claim of fundamental error is that the alleged error is clear on the existing record. Perry, Slip Op. at 20. As noted above, far from being clear, the claimed error is nonexistent. It is also clear from the closing argument that the attorneys for both sides understood the instructions to require the jury to find that Reid premeditated the murder to find him guilty, and both

[3] Reid acknowledges that the applicable legal standard is set forth in Scroggins. (Appellant's brief, pp. 14-15.) He also quotes the relevant instruction that is a word-for-word quote of that legal standard from Scroggins. (Appellant's brief, p. 12.) He at no point, however, discusses the fact that the relevant instruction comes directly from the standard as articulated by the Idaho Supreme Court, nor does he explain how a word-for-word recitation of that standard is legally erroneous. (See generally Appellant's brief.)

argued why the jury should or should not, respectively, find that Reid premeditated the murder. Reid has offered no plausible reading of the instructions that negates a finding of premeditation. (Appellant's brief, p. 12.) No error is clear on this record.

The final element of a claim of fundamental error is that the appellant must show the error was prejudicial. Perry, Slip op. at 20. To show prejudice Reid must demonstrate that the instructions misled the jury or prejudiced him. State v. Hickman, 146 Idaho 178, 181, 191 P.3d 1098, 1101 (2008). Trial counsel for the defense argued to the jury that it should acquit because the state had failed to prove premeditation by Reid and based that argument specifically on the instructions.[4] The prosecutor did not object to that argument, and in fact responded with an argument generally agreeing with defense counsel's legal standards but contending that the evidence did support a finding that Reid and Kienholz shared a community of purpose. There is nothing in this record indicating that the jury believed that it could convict Reid if his mental state was different from Kienholz's.

Even if the instructions could be said to be somehow defective, such did not prejudice Reid. Based on the closing argument summarized above, Reid's theory was plainly that the testimony of his two accomplices was not sufficiently credible to base a finding beyond a reasonable doubt that Reid was anything

[4] On appeal Reid acknowledges that his trial counsel "believed that the instructions were so worded as to require proof of premeditation by Mr. Reid independently of Mr. Kienholz's state of mind." (Appellant's brief, p. 18.) Reid argues that his trial counsel's conclusion that the instructions were correct is evidence that the error is clear on the record. (Id.)

other than a bystander who did neither the necessary acts nor held the necessary mental state for conviction. The jury obviously rejected that theory. Because all of the acts of aiding and abetting occurred before the murders (such as making the initial suggestion based on conflict between the victims and his girlfriend; helping plan the murders; carrying extra bullets in case they were necessary to complete the murders; and offering the signal to start shooting) and were acts that contemplated the killings, no reasonable jury could have found Reid did one or more of these acts without premeditation. In short, Reid has failed to show prejudice.

The instruction on the mental state element for aiding and abetting was a word-for-word restatement of the legal standard articulated by the Idaho Supreme Court. It was a correct statement of the law. Reid's claim of error lacks merit; there was no error, much less fundamental error.

II.
Reid Has Shown No Abuse Of Discretion In The Admission Of Photographic Exhibits

A. Introduction

Prior to trial Reid moved to exclude certain photographs from evidence. (R., vol. I, pp. 162-69.) The state filed a counter-motion to admit the photographs. (R., vol. I, pp. 183-84.) At the hearing on the motion the state represented that 126 photographs had been taken at the scene and that the state had pared down the number it wanted to admit to less than 30. (Tr., p. 29, L. 11 – p. 30, L. 8.) The state then presented an offer of proof as to the photographs it wished to admit at trial. (Tr., p. 30, L. 9 – p. 82, L. 15.) The district court

excluded some, but not all, of the proffered photographs depicting the victims' bodies on the basis of being cumulative or unduly prejudicial but ultimately allowed some photographs of victims' bodies taken at the crime scene. (Tr., p. 83, L. 4 – p. 94, L. 16.)

Reid asserts that the district court abused its discretion by admitting three photographs of the victim's bodies taken at the scene of the crime: Plaintiff's Exhibits 17, 22 and 27. (Appellant's brief, pp. 19-26.) Review of the record in light of the applicable law shows no abuse of discretion.

B. Standard Of Review

Relevance of evidence is reviewed de novo. State v. Zichko, 129 Idaho 259, 264, 923 P.2d 966, 971 (1996); State v. Lamphere, 130 Idaho 630, 632, 945 P.2d 1, 3 (1997); State v. MacDonald, 131 Idaho 367, 956 P.2d 1314 (Ct. App. 1998). Whether the probative value of relevant evidence is substantially outweighed by the danger of unfair prejudice is a discretionary matter that will be disturbed only if the appellant demonstrates that the district court abused its discretion. State v. Enno, 119 Idaho 392, 406, 807 P.2d 610 (1991); State v. Birkla, 126 Idaho 498, 500, 887 P.2d 43 (Ct. App. 1994).

C. Reid Has Failed To Show That The District Court Abused Its Discretion In Admitting The Three Photographs At Issue

Relevant evidence may be excluded if, in the district court's discretion, the danger of unfair prejudice -- which is the tendency to suggest a decision on an improper basis -- substantially outweighs the probative value of the evidence.

I.A.R. 403; State v. Nichols, 124 Idaho 651, 656, 862 P.2d 343, 348 (Ct. App. 1993).

> The trial court has the discretion to admit into evidence photographs of the victim in a homicide case as an aid to the jury in arriving at a fair understanding of the evidence, as proof of the corpus delicti, the extent of injury, the condition of the body, and for their bearing on the question of the degree and atrociousness of the crime. The fact that the photographs depict the actual body of the victim and the wounds inflicted on [the victim] and may tend to excite the emotions of the jury is not a basis for excluding them.

State v. Winn, 121 Idaho 850, 853, 828 P.2d 879, 882 (1992); see also State v. Hawkins, 131 Idaho 396, 402, 958 P.2d 22, 28 (Ct. App. 1998). "Under the rule, the evidence is only excluded if the probative value is substantially outweighed by the danger of unfair prejudice. The rule suggests a strong preference for admissibility of relevant evidence." State v. Martin, 118 Idaho 334, 340 n.3, 796 P.2d 1007, 1013 n.3 (1990) (emphasis omitted).

The three challenged photographs were relevant to prove that a murder had occurred, the identity of the victims, the manner of death, the manner in which the bodies had been disposed of, and to corroborate Kienholz's and Wilson's testimony about the events before, during, and after the murders. The district court applied the correct standard and, after excluding some photographs, concluded these photographs were admissible. (Tr., p. 83, L. 4 – p. 94, L. 16.)

Reid argues that the probative value of the photographs was reduced or eliminated because the fact of a murder (by Kienholz) was not seriously disputed at trial, the photographs were cumulative to the testimony, and they did not prove aiding and abetting. (Appellant's brief, pp. 23-24.) None of these arguments has merit.

First, that the defense had no evidence to counter the state's evidence (and thus certain issues were not seriously disputed) did not render the state's evidence less relevant. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination more probable ...." I.R.E. 401. Whether there were two murders is a fact of consequence in a murder prosecution. That there was no evidence that there was not a murder, and Reid's recognition that there was no evidence by which he could contest the fact there were two murders, did not make the fact of two murders of no consequence in the case.

A defendant cannot prevent the state from proving its case by evidence even with an offer to stipulate. People v. Scheid, 939 P.2d 748, 756 (Cal. 1997) ("The defense's offer to stipulate as to the fact or manner of the shootings did not negate the relevance of the photograph."); People v. Thornton, 85 Cal. App. 4th 44, 48 (Cal. App., 4th Dist., 2000) ("Nor are we prepared to revert to the outmoded notion that a criminal defendant may limit the prosecution's evidence by 'not putting things at issue.'"); Mills v. State, 615 S.E.2d 824, 827 (Ga. App. 2005) ("Moreover, 'a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the [state] chooses to present it ... [or] undermine the credibility of the State's story by selectively admitting certain incriminating evidence to prevent the jury from receiving that evidence.'") (brackets and ellipses original) (quoting Ross v. State, 614 S.E.2d 31 (Ga. 2005)); People v. Hills, 532 N.Y.S.2d 269, 274-76 (N.Y.A.D., 2d Dept., 1988) ("overwhelming weight of authority" provides that defendant may not prevent

presentation of evidence by offer to stipulate to facts). That Reid had no evidence by which he could challenge the fact that Bewick and Howard were murdered by being shot in the head and then their bodies were disposed of by dragging or throwing them down a hillside did not make evidence of these facts irrelevant and did not diminish the probative value of the photographs.

Second, the photographs were not cumulative, much less inadmissible on this basis. Evidence may be excluded if its probative value is substantially outweighed by the danger of "needless presentation of cumulative evidence." I.R.E. 403. The photographs however, were not cumulative. Although they depicted what certain witnesses also described, Reid has cited to no case holding that a party must elect between presenting a witness's testimony of events and a photograph showing the results of those events. To the contrary, photographs of physical evidence were highly corroborative of the testimony of Reid's accomplices in a trial where such corroboration of their credibility was especially important. See Scheid, 939 P.2d at 755-56 (photographs of crime scene were corroborative of witness testimony and therefore relevant (and citing similar cases)).

Finally, that the photographs did not themselves establish Reid's role in the crime did not make them irrelevant nor diminish their probative value. Other than fingerprints or DNA evidence, physical evidence at a crime scene rarely establishes identity of the criminal, but it would be ridiculous to contend that such evidence is therefore rendered irrelevant. The state had the burden of proving that there were two murders in order to convict Reid of having aided and abetted

them, and had the added burden of convincing the jury that two fellow accomplices were telling the truth about the facts of those murders. The photographs of the bodies of the murder victims taken at the crime scene were highly probative of facts of consequence to the determination of the action.

Reid also argues that the photographs were prejudicial because one depicted Howard's body with his arms out from his body "like Christ on the cross" and because they showed insects had started to consume the bodies. (Appellant's brief, 22-24.) He compares his case to State v. Phillips, 117 Idaho 609, 790 P.2d 390 (Ct. App. 1990), and State v. Spreitz, 945 P.2d 1260 (Ariz. 1997). (Appellant's brief, pp. 24-25.) Reid has failed, however, to show an abuse of discretion in the district court's balancing of potential prejudice against probative value.

First, there is nothing in the record to suggest that anyone in the trial court believed that State's Exhibit 17 was evocative of Christian iconography. On the contrary, what the photograph depicts is a body that was dragged by its feet down a steep decline such that the shorts and shirt on it rode up and the arms moved up until they were out to the sides roughly perpendicular to the torso; the photograph simply depicts the body in the position it was found at the crime scene. (Tr., p. 250, L. 10 – p. 260, L. 1; p. 261, L. 12 – p. 269, L. 15; p. 275, L. 23 – p. 276, L. 9.) The photograph thus depicted the position of the body when discovered by police and is evidence of both the fact of the murder and of how the body came to be where it was; the exhibit was not evidence that Reid had

killed the Son of God. Reid has failed to show prejudice in the relative position of the arms of the body as shown in the exhibit.

Second, two of the photographs had evidence of insect activity as the beginning of decomposition. (State's Exhibits 22, 27.) Again, the photographs merely depicted the bodies as they were discovered. The photographs were used to establish identity and the existence of gunshot wounds in the heads of the victims. The depiction of insect activity itself was used to show how police concluded when the murders had occurred relative to the discovery of the bodies. (Tr., p. 279, L. 6 – p. 280, L. 9; p. 282, L. 18 – p. 284, L. 5.) Although these photographs are unpleasant, all photographs of murder victims share this characteristic to one degree or another. Reid has failed to show that the district court abused its discretion in balancing the probative nature of these photographs against the potential for prejudice.

Finally, the cases relied on by Reid do not support his argument. In Phillips the Idaho Court of Appeals applied the general rule that photographs of the victims are generally admissible to show a number of things, including "as an aid to the jury in arriving at a fair understanding of the evidence, proof of the corpus delicti, extent of injury, condition and identification of the body ...," Phillips, 117 Idaho at 611-12, 790 P.2d at 392-93, all relevant facts in this case. The Court held that two photographs of the vehicular homicide victims were admissible, rejecting the argument that identification of the victims by witnesses did not bar admission of the photographs because "the state was not bound to establish identity by the least-prejudicial means possible," id. at 612, 790 P.2d at

393, refuting Reid's argument that the photographs in this case were cumulative to the testimony. The court did find error in admitting a photograph of the victim's scalp lying near the accident because it had no probative value and some potential for prejudice, but concluded the error was harmless. Id. Clearly the analysis of Phillips most applicable here was the analysis the Court applied when it found the two photographs of the victims to have been properly admitted. This case, far from supporting Reid's argument, supports the district court's exercise of discretion. See also State v. Hoak, 147 Idaho 919, 216 P.3d 1291 (Ct. App. 2009) (citing Phillips for proposition that generally the appellate court will find an abuse of discretion under I.R.E. 403 only when the evidence had little, if any, probative value).

In State v. Spreitz, 945 P.2d 1260, 1271 (Ariz. 1997), the appellant challenged the admission of "several autopsy photographs of the victim" where the "corpse is severely discolored" and insects partly covered the body and were "vividly apparent in the close-ups." "Perhaps the most disturbing photograph ... depicts the victim's face staring at the camera in a mummy-like mask of death." Id. The court noted that it "cannot compel the state to try its case in a sterile setting" and that photographs of the victim's body are relevant for many things in a murder case. Id. at 1272 (internal quotations omitted). The court stated that it would "reverse on appeal if gruesome evidence is admitted for the **sole purpose** of inflaming the jury." Id. (emphasis original, internal quotes omitted). The court did find the photographs relevant to show the fact and cause of death but, noting that the medical examiner did not even use two of the most unsettling

photographs in explaining the injuries, concluded that they were not very probative of these matters. Id. at 1272-73. The court therefore concluded the trial court had abused its discretion, but found the error harmless. Id. at 1373.

Of course it is difficult to actually compare that case to this one as we have only a rather vague description of the photographs at issue in Spreitz. That description would indicate, however, that the photographs in that case were more numerous, more gruesome, and less relevant than in this case. Compare State v. Canez, 42 P.3d 564, 585-86 (Ariz. 2002) (comparing Spreitz and finding photographs of the dead victim's face showing bruises and cuts was not "unduly disturbing"). Unlike the "mummy-like" face in Spreitz the photographs of the victims in this case are clearly relevant to identification. Likewise, unlike those photographs that were not particularly helpful in showing the injuries and cause of death the photographs in this case were very helpful for those purposes. Moreover, there is no mention in that case that the presence of insects was relevant, whereas the presence of insects in this case helped establish the time between the murders and the discovery of the bodies, a fact important at both trial and in the investigation. In short, Reid's claim that the photographs in Spreitz and this case are "very similar" does not withstand scrutiny.

Reid has failed to show an abuse of discretion. Although photographs of the body of a murder victim generally, and the photographs at issue in this case, are unpleasant and carry some potential for prejudice, the district court properly exercised its discretion when it admitted the three photographs here at issue.

III.
Reid Has Failed To Show Fundamental Error In The Evidence The District Court Considered At Sentencing

A. Introduction

A few hours prior to the sentencing the state submitted, in support of its sentencing recommendation, a transcript of an interview with Ronald Rollins, a former cellmate of Reid's. (R., vol. II, pp. 354-78.) On appeal Reid claims that he objected to the district court considering this evidence, but that the district court overruled the objection, and claims that this was error. (Appellant's brief, pp. 26-32.) Review of the record, however, shows that Reid did not object. Rather, he argued that Rollins' statements were not entitled to weight, and the district court merely commented on what weight it thought the statements were entitled to. Because there was no objection as argued on appeal, the proper legal standard is one of fundamental error, and Reid has failed to show fundamental error.

B. Standard Of Review

"The district court has broad discretion in determining what evidence is to be admitted at a sentencing hearing." State v. Matteson, 123 Idaho 622, 625, 851 P.2d 336, 339 (1993) (quoting State v. Johnson, 101 Idaho 581, 583, 618 P.2d 759, 761 (1980)).

C. Reid Has Failed To Show Fundamental Error In His Sentencing

1. Reid Did Not Preserve His Appellate Argument

"It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal." State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000). Whether an issue was preserved presents a "threshold" inquiry. State v. Stevens, 115 Idaho 457, 459, 767 P.2d 832, 834 (Ct. App. 1989). It is well-settled that an objection on one ground will not preserve a separate and different basis for excluding evidence. State v. Norton, 134 Idaho 875, 880, 11 P.3d 494, 499 (Ct. App. 2000); State v. Enyeart, 123 Idaho 452, 454, 849 P.2d 125, 127 (Ct. App. 1993) (limiting appellate review to scope of objection). Where defendant's objection is on one ground, on appeal the reviewing court will not address alternate grounds upon which a defendant claims the evidence should have been excluded. In re Doe, 146 Idaho 277, 281 n.4, 192 P.3d 1101, 1105 n.4 (Ct. App. 2008) (citing State v. Stevens, 115 Idaho 457, 459, 767 P.2d 832, 834 (Ct. App. 1989) ("[A]n objection on one ground will not be deemed sufficient to preserve for appeal all objections that could have been raised.")). Review of the record shows that Reid did not preserve his appellate argument that consideration of the transcript violated his due process rights.

The state filed the transcript with the district court about four hours before the sentencing hearing. (Compare R., vol. II, p. 354 with Tr., p. 757, L. 1.) Early in the hearing the court stated what it had reviewed in preparation for the hearing, including the state's submission. (Tr., p. 762, Ls. 2-12.) No objection

was raised at that time, and the prosecutor proceeded with his argument, which included several references to the transcript. (Tr., p. 762, L. 2 – p. 768, L. 11.)

The defense started its argument by pointing out that Reid had turned himself in and that was how the state acquired much of the evidence eventually used to convict the participants in the murders. (Tr., p. 768, Ls. 16-21.) He stated that Reid provided the evidence that led the police to know who was involved and what roles they had played. (Tr., p. 768, Ls. 21-25.) He asserted that, despite Reid's cooperation, the state then went out and made deals with Kienholz and Wilson without giving Reid any chance at a meaningful plea agreement, making Reid a kind of scapegoat for the state's need to have a public trial. (Tr., p. 768, L. 25 – p. 769, L. 17.) The defense continued, addressing Reid's prior criminal record, claiming that Reid had been cooperative in prior cases and asserting that such cooperation had also been present in this case. (Tr., p. 769, L. 18 – p. 770, L. 15.)

At this point in the argument Reid's counsel addressed the Rollins transcript as quoted in the Appellant's brief, stating that Rollins had "no credibility" because his statement was not corroborated by the trial evidence and that it was all an attempt by Rollins to seek leniency from the state. (Tr., p. 770, L. 16 – p. 771, L. 5 (quoted in Appellant's brief, p. 29).) The defense sentencing argument then continued at length, covering almost 14 more pages of transcript. (Tr., p. 771, L. 6 – p. 785, L. 22.)

In articulating its reasoning for its sentence, the district court started with Mr. Reid's criminal record. (Tr., p. 786, L. 17 – p. 787, L. 2.) It then discussed

Reid's substance addictions and set forth the goals of sentencing. (Tr., p. 787, Ls. 3-13.) It discussed the victim-impact statements and the effect the murders had on the families of the victims and on Reid's family. (Tr., p. 787, L. 14 – p. 788, L. 18.) The court then turned to the Rollins transcript, acknowledged the defense argument about lack of credibility and stated that the statements should be taken with a grain of salt, but then concluded that the statements were not entirely without credibility because Rollins seemed to know some facts about the case before those facts became public. (Tr., p. 788, L. 21 – p. 789, L. 19.) The court then considered the Rollins statements in conjunction with the trial evidence and concluded that Reid had initiated the idea to murder Bewick and Howard, helped plan the murders, and actively participated in the murders. (Tr., p. 789, L. 20 – p. 790, L. 6.) The district court then went on to discuss different sentencing factors that played a role in its decision. (Tr., p. 790, Ls. 7-22.)

In context, it is clear from the record that there was no defense request that the district court exclude the Rollins transcript as evidence at sentencing. The discussions of that evidence that Reid on appeal claims were an objection and a ruling came in the middle of discussing other sentencing evidence; the claimed objection was not made when the district court first stated what evidence it had reviewed; the claimed objection and ruling are separated in time and by many pages of transcript; and the alleged objection came after the prosecution had argued the significance of the evidence in question. Although Reid asked the court to give the transcript no weight, he did not ask for its exclusion. Reid's

appellate claim that he objected to consideration of the transcript and that such objection was overruled is disproved by the record.

Because no request to exclude the transcript was made and no ruling on such exclusion obtained, Reid's appellate argument was not preserved for appellate review. Because the claim of error was not preserved it is Reid's burden to show fundamental error.

2. Reid Has Failed To Show Fundamental Error

As stated above, to show fundamental error Reid must show (1) a violation of an unwaived constitutional right; (2) that the error is "clear and obvious" on the record; and (3) that the error affected the outcome of the proceedings. State v. Perry, Docket No. 34846, 2010 Opinion No. 83 at pp. 20 (Idaho, July 23, 2010). Application of this standard shows no fundamental error.

First, Reid has failed to show error, much less error of a constitutional magnitude. It is well settled that a sentencing court may consider a broad range of information when fashioning an appropriate sentence. State v. Moore, 93 Idaho 14, 17, 454 P.2d 51, 54 (1969); State v. Dunn, 134 Idaho 165, 172, 997 P.2d 626, 633 (Ct. App. 2000); State v. Morgan, 109 Idaho 1040, 1043, 712 P.2d 741, 744 (Ct. App. 1985). A defendant is denied due process when the sentencing court relies upon information that is materially untrue or when the court makes materially false assumptions of fact. Dunn, 134 Idaho at 172, 997 P.2d at 633. The appellate court presumes that the sentencing court is able to ascertain the relevancy and reliability of the broad range of information and material which is presented to it during the sentencing process. State v. Pierce,

100 Idaho 57, 58, 593 P.2d 392, 393 (1979); State v. Campbell, 123 Idaho 922, 926, 854 P.2d 265, 269 (Ct. App. 1993); State v. Bundy, 122 Idaho 111, 112-13, 831 P.2d 953, 954-55 (Ct. App. 1992); State v. Holmes, 104 Idaho 312, 314, 658 P.2d 983, 985 (Ct. App. 1983).

Reid has failed to show that his sentence was "founded at least in part upon misinformation of constitutional magnitude." United States v. Tucker, 404 U.S. 443, 447 (1972). The district court recognized that Rollins' statements about what Reid had told him "should be taken with a grain of salt." (Tr., p. 789, Ls. 2-5.) The court concluded, however, that "there is some evidence just from the statements, themselves, that they do have an element of credibility because [Rollins] has details that would not have been known to him except had they been given him by Mr. Reid, as he stated." (Tr., p. 789, Ls. 6-19.)

Reid argues that Rollins' claims about Reid's jailhouse statements "were in very large part inconsistent with the evidence presented at trial." (Appellant's brief, p. 32.) Specifically he points out that Rollins stated that Reid had claimed to have stepped on Bewick's face and dislocated her jaw, but at trial Kienholz admitted to have been the one who kicked Bewick in the face; that Rollins mentioned a previous, unsuccessful effort to obtain a firearm but that there was no evidence at trial of such an effort; and Rollins' statement that Reid had said "something" happened at Jared Coe's house but the trial evidence did not indicate anything of significance happened there. (Appellant's brief, pp. 27-28.) He also points out that Rollins stated that Reid had claimed the motivation for the murders was robbery but at trial the state presented evidence that the motive

was to avenge an insult to Reid's girlfriend, Purtill. (Appellant's brief, p. 28.) Finally, he contends that Rollins stated that Reid had claimed that he had planned the murders for two to three days in advance but Kienholz testified that the murders were planned the same day they were executed. (Appellant's brief, p. 28.)

It is odd that Reid, who claimed that Kienholz's trial testimony was unbelievable in closing argument, would on appeal claim that he is the gold standard for reliability. Mere differences in details between Kienholz's trial testimony and the statements Rollins attributed to Reid do not make Rollins' statements inherently so unreliable that the district court fundamentally erred by considering Rollins' statements. On the contrary, the district court concluded that Rollins also made statements indicating that he knew details of the crime that could only be explained by Reid having told him about them. (Tr., p. 789, Ls. 6-19.) Reid does not dispute this on appeal.

The record supports the district court's determination. Rollins knew that it was Reid who had motioned for "Bubba" (Kienholz) to shoot (R., vol. II, p. 361), that Reid went down the embankment to the bodies to retrieve the keys to Howard's car (R., vol. II, p. 362), that Reid and Kienholz had acquired the murder weapon in trade for marijuana (R., vol. II, p. 364), that there had been a discussion about fleeing to Bolivia to avoid arrest warrants (R., vol. II, p. 365), and that Reid was concerned his fingerprints might be on the gun because he had handled it in the car (R., vol. II, p. 372). On the other hand, it is hardly surprising that Reid and Kienholz might have told inconsistent versions (Kienholz

in testimony at the trial and Reid to a fellow inmate) and that Reid's version may have been somewhat garbled by Rollins.

There are always going to be credibility issues with any jailhouse snitch. In addition, evidence often conflicts. That a jailhouse snitch provided evidence that conflicts with other evidence is then hardly surprising. It is also hardly a matter of constitutional significance. The district court recognized the credibility issues associated with Rollins' statements and took them with a grain of salt and only in conjunction with the trial evidence. (Tr., p. 788, L. 21 – p. 790, L. 6.) Reid has failed to show error, much less constitutional error.

The second thing Reid must show to demonstrate fundamental error is that the error is plain on the record. Given both the appellate standard that presumes the district court understands the limits of what weight to give evidence at sentencing, State v. Pierce, 100 Idaho 57, 58, 593 P.2d 392, 393 (1979), and the district court's own recognition that Rollins' statements "should be taken with a grain of salt," Reid has failed to show that the error he claims was plain.

Finally, Reid must show prejudice. Here the district court only specifically considered Rollins' statements in conjunction with the trial evidence as showing Reid's role in the murders. (Tr., p. 789, L. 20 – p. 790, L. 6.) That role, found the district court, was that Reid initiated the murders, helped plan the murders, and voluntarily and actively participated in the murders. (Tr., p. 790, Ls. 1-6.) Really, then, the district court used the Rollins transcript to find little more than what the jury had already found beyond a reasonable doubt. Reid has made no showing

that the district court would have viewed the crime, or the applicable sentence, any differently but for the Rollins transcript.

Reid did not preserve his appellate argument by timely and proper objection below. Reid has also failed to show error, much less fundamental error in the district court's limited reliance in sentencing on the Rollins transcript.

CONCLUSION

The state respectfully requests this Court to affirm the district court's judgment.

DATED this 4th day of November, 2010.

KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 4th day of November, 2010, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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